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No. 97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

LLOYD WEBER, RUSSELL DAVIS, WALTER PATRICK, THOMAS BLAKE, ALBERT MELTON, WINFIELD SCOTT MUSLER, ROBERT HAMMER, WILBERT A. REED, BERNARD SIEMER, and THOMAS MULVANEY, Individually and as Representatives of the INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT No. 9, *Petitioners*.

v.

ANHEUSER-BUSCH, INC., a Corporation

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF FOR THE CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE*

ARTHUR J. GOLDBERG
General Counsel
DAVID E. FELLER
Associate General Counsel
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

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INTRODUCTION

This brief *amicus curiae* is submitted by the Congress of Industrial Organizations with the consent of the parties, as provided for in Rule 42 of the Rules of this Court. It is submitted by the CIO because of the importance of the issue involved to all labor organizations, which would be threatened by the progressive deterioration of the rights

guaranteed them by the federal Labor-Management Relations Act through separate and inconsistent state action if the decision below is permitted to stand.

STATEMENT

This case concerns a dispute between the parties over the terms of a collective bargaining agreement. Petitioners compose the membership of the Machinists Union employed by respondent. The union was certified as the collective bargaining representative in an appropriate unit in respondent's St. Louis plant, by action of the National Labor Relations Board (R. 25).

In the agreement applicable to the calendar year 1951, the parties agreed to the following language inserted after the definition of the work jurisdiction covered by the agreement:

> "In the event it becomes necessary to have such work hereinbefore described contracted out, the Employer shall let out such work to and select contractors who have with the International Association of Machinists collective bargaining agreements which contain provisions corresponding to or consistent with the aforesaid jurisdictional limitations." (R. 94).

This language was apparently adopted after consultation with the National Labor Relations Board. (R. 69).

When negotiations for a new collective bargaining agreement were in progress, beginning in December, 1951, pursuant to notices sent by the Union in compliance with the Act (R. 25, 69), respondent notified the union that it wished to discontinue the above clause. Petitioners were unwilling to agree to the deletion of this clause. They explained to respondent that they regarded the clause as absolutely necessary to protect the work of their bargaining unit, as defined in the agreement, and to protect their working standards. Nevertheless, the company refused to sign an agreement containing this clause.

When it became clear no agreement would be forthcoming without such action, petitioners called a strike and peacefully picketed respondent's plant.

Both the union and the company filed unfair practice charges under the Federal Act. On the union charge that the company was not bargaining in good faith, originally filed on March 25, 1952, the General Counsel sustained the Regional Director's refusal to issue a complaint. See Administrative Decisions of General Counsel, NLRB Case No. 766, August 17, 1953, CCH Labor Law Service, Par. 12,776. The company charge that the union was violating Section 8(b)(4)(D) filed April 8, 1952, was given full hearing; and the Board granted the union's motion to quash the notice of hearing. 101 N.L.R.B. 346.

On April 19, 1952, respondent filed its petition and complaint in this case, seeking an injunction against the picketing which petitioners conducted in connection with their strike. A permanent injunction was granted (R. 83) and affirmed by the Supreme Court of Missouri (R. 104, 119). Petitioners promptly raised and properly saved their objection that the injunction was beyond the state court's jurisdiction because Congress had pre-empted the field.

SUMMARY OF ARGUMENT

This case cannot be decided on the broad issue as to whether Congress has prevented Missouri from enforcing its anti-trust laws. The question is whether Congress has, in the Taft-Hartley Act, established the exclusive machinery for dealing with precisely the same assumed evils which Missouri is seeking to prevent here.

Analysis of the decision of the Supreme Court of Missouri shows that the reasons why it found that the petitioner's strike is illegal cover precisely the same area which Congress thoroughly canvassed in enacting the Taft-Hartley Act. Missouri's conclusion that the Machinists' course of conduct here should be enjoined rested, and rested ex-

clusively, on considerations relating to compulsory union membership, secondary boycotts, jurisdictional disputes, and industry-wide bargaining. The only possible genuine anti-trust consideration—the limitation of competition among sub-contractors to those employing members of the Machinists union—was not even mentioned.

Examination of the Taft-Hartley Act and its legislative history shows that each of these considerations was weighed carefully by Congress in enacting the Taft-Hartley Act. Some of the assumed evils which Missouri found here is prohibited; others, including the unmentioned consideration listed above, it affirmatively decided were not a proper basis for prohibition.

The congressional action and consideration precludes Missouri from redetermining the same issues. This conclusion is emphasized when the real dispute here is analyzed. The nub of the controversy here is the Machinists' desire to retain a clause limiting the contracting-out of work. Such clauses are common in American industry and perform a definite and important function in maintaining the wages, hours and working conditions specified in collective bargaining agreements. Union efforts to obtain and preserve such clauses, therefore, are within "the area of labor combat designed to be free" (346 U.S. at 500) unless they transgress the specific prohibitions of Section 8(b) of the federal Act.

All contracting-out clauses have some restraining effect on trade. Indeed, any strike for any purpose has such an effect. The question here is whether Missouri can decide whether the purpose sought to be achieved by the Machinists here through their contracting-out clause is a permissible one. Since the only objections to it which Missouri has are objections with which Congress has dealt, and dealt exclusively, we conclude that Missouri has no authority to draw the line. The decision below must, therefore, be reversed.

ARGUMENT

I.

THE NATURE OF THE QUESTION PRESENTED

We assume in this brief that the decisions of this Court establish the proposition that the Congressional regulation of labor—management relationships, which is contained in the Taft-Hartley Act, prevents a state from enforcing upon parties subject to the federal act the state's own labor relations policy. *Bus Employees* v. *Wisconsin E.R.B.*, 340 U.S. 383, *Automobile Workers* v. *O'Brien*, 339 U.S. 454, *Plankinton Packing Co.* v. *Wisconsin E.R.B.*, 338 U.S. 953, and *Garner* v. *Teamsters Union*, 346 U.S. 485. The federal statute does not, however, prevent the states from enforcing their traditional policies which do not involve a weighing of the social interests involved in labor relations matters even though those policies happen to be applied in a labor-management controversy.

Thus, the states may find liability for acts of violence and take appropriate police measures to prevent their recurrence, whether the violence occurs in connection with a strike, political rally or in Joe's Bar. In such cases, the state is enforcing its policy against disturbances of the peace, not its policy relating to strikes, its policy relating to political matters, or its policy relating to the dispensing of alcoholic beverages. On the other hand, regulation which has as its basis a decision by the state that a particular kind of union activity should be restrained, or permitted only under certain conditions, is a matter of labor policy and cannot be enforced if the parties are subject to the federal act. Congress has pre-empted this field and closed it to state regulation.

It is, perhaps, tempting to state the issue presented in this case as whether a state may restrain concerted activity by a union which seeks to achieve a result which

the state regards as violative of its anti-trust laws. But such a statement confuses, rather than clarifies, the issue. It might be argued, under the doctrine which we have summarily stated, that an agreement between an employer and a union to fix uniform prices for a product could be enjoined by a state under its anti-trust laws, because the agreement would constitute a violation of the anti-trust laws, whether or not one of the participants was a union and wholly apart from the labor management relationship. It seems quite clear, on the other hand, that a state could not make strikes for higher wages illegal on the ground that the necessary effect of such strikes must be to restrain trade in the products which would otherwise have been manufactured by the struck plant. Such a policy decision would conflict with the decision made in the Wagner and Taft-Hartley Acts.

The fact that the state law being enforced in a particular instance is entitled an anti-trust law, as in this case, or a labor relations statute, as in the *Garner* case, is not therefore decisive. The answer as to the state's power must be found in each case not in the title of the statute enforced but in the nature of the interest which the state seeks to protect.

The question in this case, then, cannot be stated simply in terms of the state's right to enforce its anti-trust laws. The question in this case must be whether the interest sought to be protected by Missouri in this application of its anti-trust law is an interest as to which Congress has already determined the nature and the extent of the protection which is to be provided. Stated alternatively, the question is whether Congress has already balanced the social interests involved in this case so as to prevent Missouri from independently re-deciding what Congress has already decided

In order to resolve this issue we must first turn to an analysis of the decision of the Supreme Court of Missouri

in an effort to determine the basis upon which that Court held that the action of the union here constituted a violation of Missouri's anti-trust law. We then must turn, briefly for the issue will undoubtedly be dealt with at length by the parties, to the question of whether Congress in the Taft-Hartley Act has dealt with the social interests which we find Missouri has sought to protect. If we find that the considerations involved in reaching Missouri's decision cover the same area as those necessarily involved in the judgment which Congress has made, we must conclude that the state cannot enforce its own resolution of the conflicting social interests involved. If we find, on the other hand, that the considerations involved in Missouri's decision are unrelated to those upon which Congress has already cited, the action of the Missouri Court can stand.

While never clearly stated, concepts somewhat similar to those outlined above were in fact discussed by the Supreme Court of Missouri. That court's way of stating the issue was in the form of two questions:

(1) Did the petitioner's conduct constitute a restraint of trade?

(2) Was there a "labor dispute" or an "unfair labor practice" involved?

The court answered the first question in the affirmative and the second in the negative, and these answers were the twin props of its decision. We turn now to an examination of those answers.

II.

THE BASIS OF THE MISSOURI COURT'S DECISION

A. Restraint of Trade

The court below did not spell out in coherent fashion the reasons which underlay its conclusion that the petitioners were conspiring to restrain trade. A careful reading of

the opinion of the court, however, discloses the elements upon which its conclusion was based. These elements were stated by the Court as follows:

> ". . . the Union sought, through the exercise of coercive pressure on plaintiff, to expand the scope of its representation to cover and include employees of the . . . independent construction contractors;" (R. 107).

> "The union announced its purpose and intention to obtain agreements similar to Section 2, Article VII, above, from all breweries in the St. Louis area so that under pressure from all brewers the construction contractors would be compelled to bargain with the Union as bargaining representative for their employees moving, erecting and installing machinery notwithstanding those employees were already represented by the Millwright's Union, or, the construction contractors would be compelled to replace their Millwright employees with Machinist employees;" (R. 108).

> ". . . under the terms . . . sought to be imposed by the Union persons employed by or seeking to work for the . . . construction contractors . . . would be compelled to forego representation by their present bargaining agent, the Millwrights' Union, with whom the said construction contractors now have valid collective bargaining agreements, and become affiliated with the Machinists' Union in order to retain their employment with such contractors or lost their opportunity for periodic employment at that work;" (R. 108-109).

> ". . . we rule from the above noted substantial evidence that: (a) the above conduct of defendants and the Union, as directed against the independent construction contractors and their Millwight [*sic*] employees, constituted and was a conspiracy in violation of the common and statutory law of this State; (b) that the sole and unlawful purpose of the concerted action of defendants and the Union in picketing plaintiff's plant was to effectuate the Union's un-

lawful conspiracy and to compel and coerce plaintiff to join said conspiracy to violate the law by acquiescing in the Union's unlawful demands; (c) that the picketing of plaintiff's plant was effectuated by an agreement and combination of the members of the Union [fol. 113] in restraint of trade . . . " (R. 111-112).

"In that picketing defendants took their final steps in their effort to coerce and compel plaintiff to become an active participant in defendant's conspiracy against the independent contractors and their Millwright Union employees. The instant picketing was for an illegal purpose." (R. 112).

Shortly stated, the Missouri court held that the strike against Anheuser-Busch, and its attendant picketing, was illegal because it was part of a conspiracy or combination to achieve an illegal purpose. The two elements are (1) the conspiracy or combination and (2) the illegal purpose. The conspiracy consisted of the plan to obtain contract clauses similar to the one involved here from all of the brewers in the St. Louis area. The illegal purpose consisted of the intended effect upon those with whom the brewers did business—the construction contractors and their employees. The evil in the intended effect was either that installation work now performed by millwrights would be reassigned to machinists or that those performing the work would be required to become affiliated with the Machinists' Union.[1]

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[1] The court below did find also that the picketing was and constituted a local transportation combination which denied and unlawfully prevented the transportation of products or commodities to or from plaintiff's plant, and the processing and manufacturing of products and commodities therein." (R. 112). It is clear on the record that this was considered incidental and minor by the parties and the court, and swallowed up in the larger constitutional issues. There was no more or less "transportation" combination or restraint, than any other kind of restraint of trade; and the consequences of the "transportation" restraint are the same as those discussed in the text of restraints generally. The injunction was not confined to

What are the social interests which the State of Missouri, through its statute as thus interpreted and applied, seeks to protect? What evil or combination of evils does the state seek to prevent? Reading backwards, from effect to cause, the different evils which the Supreme Court of Missouri found to be compounded in this case seem to be these:

(1) *Compulsory Union Membership:* millwrights should not be compelled by their employers either to join the Machinists Union or be deprived of work if they do not so join.

(2) *Jurisdictional Disputes:* an employer of millwrights should not be placed in the middle of a dispute between the two unions over work assignments which he cannot resolve and in which he is in nowise at fault.

(3) *Secondary Economic Pressure:* economic pressure should not be exerted against a brewery to compel an employer—a construction contractor—with whom the brewery does business to take action against his employees. The brewery is not a party to any dispute which may exist between a contractor and his employees and economic punishment should not be visited upon him because of such a dispute.

(4) *Industry-wide Bargaining:* unions should not be allowed to exert economic pressure against all the employers in an industry—the brewers—to obtain a uniform contract provision from each.

Which of these evils, if considered apart from the other, the State of Missouri would find sufficient to warrant condemnation under its anti-trust laws need not concern us here. Perhaps Missouri would enjoin direct picketing

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blocking ingress or similar matters, but had the broadest possible coverage under the circumstances (R. 98-100).

There was no finding that even the one or two incidents upon which this transportation holding rested were not "peaceful," so we shall throughout this brief refer to petitioners' conduct as peaceful, without qualification.

against the contractors to compel them to make their employees join a union. Perhaps such picketing would be enjoined only if the dispute was a jurisdictional one—i.e., involved the assignment of work between unions rather than organization of the unorganized. Perhaps the critical element is the secondary pressure found here—the strike against the brewers to coerce the contractors. Perhaps all of these elements together would not violate Missouri's law, if they were not part of an organized effort directed at all of the breweries in the area. On the other hand, perhaps the first two elements are unnecessary, and the exertion of concerted secondary pressure upon the brewers would constitute a sufficient evil to warrant condemnation whatever the nature of the dispute with the contractors. We do not know and we do not need to know. What we do need to know is that this catalogue includes every element of undesirability which is suggested by the opinion of the Supreme Court of Missouri.

There is another element which, although not even suggested by the Supreme Court of Missouri, might be set forth as a basis for anti-trust condemnation of a strike and its attendant picketing. This element would be the claimed economic interest of all of the people of Missouri in maintaining full and free competition between all employers engaged in the same business, irrespective of the union affiliation of their employees. The evil to be prevented can be stated as No. 5 in our catalogue:

(5) *Restriction of Competition:* any agreement which restricts the persons to whom an employer may sub-contract work is bad because it restricts competition among the potential sub-contractors.

B. No "Labor Dispute"

The court below was made aware that it might be invading a congressionally pre-empted field, and apparently

believed it had hurdled this constitutional barrier by reiterating that there was "no labor dispute" between these parties. (R. 105, 109, 112, 115, 117, 118, 119, 125). Had it recognized a "labor dispute," the court presumably would have held that it lacked jurisdiction in the face of the federal Act.

This is not the accurate way to state the issue. Although "labor dispute" is defined in Section 2(9) of the Act,[2] the concept is not made meaningful. The Act in Section 7 protects "concerted activities for the purpose of collective bargaining or other mutual aid or protection"[3] and in Section 8 it forbids certain particular kinds of concerted activity. These two concepts, rather than the definition of "labor dispute" define the area which Congress has pre-empted. But if "labor dispute" were the touchstone, the court below was obviously in error.

The bare assertion that "a jurisdictional quarrel between two rival labor unions is not a labor dispute within the Norris-LaGuardia Act, the Wagner Act or the Taft-Hartley Act" (R. 117) egregiously disregards *United States* v. *Hutcheson*, 312 U.S. 219, which decided the exact opposite under the Norris-LaGuardia Act, on the basis of precisely this controversy, involving these same unions, the same work and this same plant. This court held that the Norris-LaGuardia Act "explicitly formulated the 'public policy of the United States' in regard to industrial conflict, and by its light established that the allowable area of union activity was not to be restricted, as it had been in the *Duplex* case, to an immediate employer-employee relation." 312 U.S. at 231. Section 13(c) of that Act defines a "labor dispute" as including "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the

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[2] 29 U.S.C. (Supp. V) § 152(9).

[3] 29 U.S.C. (Supp. V) § 157.

proximate relation of employer and employees."[4] Both the Wagner Act and the Taft-Hartley Act contain this same definition.[5]

III.

THE CONGRESSIONAL DECISION

We have listed above the five different evils which Missouri conceivably could have sought to prevent by enjoining the petitioner here.

That Congress considered all of these assumed evils and prescribed specific and defined measures to be employed to prevent such of them as it believed should be prevented cannot be doubted. Let us examine each item in our pentalogue.

(1) *Compulsory Union Membership.* This subject Congress covered specifically in Sections 8(a)(3) and 8(b)(2) of the Federal Act. Section 8(a)(3) provides that, except in certain defined cases, it shall be an unfair labor practice for an employer to encourage or discourage membership of his employees in any labor organization by discriminating against them in regard to hire or tenure of employment. Section 8(b)(2) provides that it shall be an unfair labor practice for a union to attempt to cause an employer to take such action. We assume that it is now settled that a state may not enforce a similar commandment. *Garner* v. *Teamsters*, 346 U.S. 485; *Building Trades Council* v. *Kinard Constr. Co.*, 346 U.S. 933.

(2) *Jurisdictional Disputes.* Here, too, Congress has specifically acted. Section 8(b)(4)(D) makes a jurisdictional strike an unfair labor practice. It forbids unions to engage in concerted action to require an employer to assign particular work to employees in one craft or labor

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[4] 29 U.S.C. (1946) § 113(c).

[5] 49 Stat. 449, 450, 29 U.S.C. (1946) § 152(9); 61 Stat. 136, 137, 29 U.S.C. (Supp. V) § 152(9).

organization rather than to employees in another craft or organization. Furthermore, Sections 10(k) and 10(l) and 303(4) disclose a comprehensive scheme of Federal enforcement including expedited unfair labor practice proceedings before the NLRB, an injunction which the Board (not the employer) is *required* to seek in the Federal Courts, special proceedings by the Board to resolve the jurisdictional dispute, and suits for damages (but not for an injunction) by the injured employer. Congress has thus provided a veritable battery of alternative and cumulative weapons to deal with jurisdictional disputes and it requires some temerity to urge that the states are nevertheless free to offer the one remedy which Congress refused.

(3) *Secondary Economic Pressure.* Here, too, Congress has specifically legislated. Sections 8(b)(4) (A) and (B) outlaw secondary economic pressures by making it an unfair labor practice for a union to engage in concerted action against one employer to compel him to cease doing business with another or to compel some other employer to recognize or bargain with a labor organization, unless that organization has been certified as the bargaining representative of the employees of the other employer. Again Congress has provided a battery of enforcement weapons, omitting only the special proceedings before the Board which are provided for in the case of jurisdictional disputes.

(4) *Industry or Area-Wide Bargaining.* This is an alleged evil which Congress has considered, at length and repeatedly. To this date, at least, the result of this consideration has been the rejection of proposals to restrict industry and area-wide bargaining and the inclusion of concerted action by a union on an industry or area-wide basis within the protective scope of Section 7 of the federal Act.

The subject need not be developed at length. In H.R.

3020, the version of the Taft-Hartley Act which the House originally passed, there were specific and detailed provisions absolutely prohibiting industry or area-wide bargaining.[6] The question of industry-wide bargaining was considered in the Senate but the majority report did not contain any recommendation for outlawing such bargaining. The supplemental views of Senators Taft, Ball, Donnell and Jenner did recommend an amendment which would "not outlaw industry-wide or area-wide bargaining as does the House Bill" but which would limit the authority of an international union with respect to its locals.[7] The final Senate bill did not contain the proposed amendment and the House provisions relating to industry-wide bargaining were omitted in conference.[8]

In the absence of Congressional disapproval of industry or area-wide bargaining, the National Labor Relations Board has consistently certified single unions which represent many, if not all, of the employers in a single industry or area. The activities of such unions in seeking

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[6] See House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 9. Section 9(f)(1) of H.R. 3020, as it passed the House, provided that a union that represented employees of any one employer could not act as the representative of the employees of any competing employer, except in certain limited circumstances. Section 2(16) of the bill defined a "monopolistic strike" as a strike resulting from a concerted plan of action between employees of competing employers or between representatives of such employees, except where there was a common bargaining representative under the provisions of Section 9. Section 12(a)(3) of the bill declared that calling or engaging in a monopolistic strike was an unlawful concerted activity. These provisions were coupled with a repeal of the Norris-LaGuardia Act insofar as it was found applicable in anti-trust proceedings and an amendment of the Clayton Act to provide specifically that action of a labor organization in engaging in concerted activities declared to be unlawful under Section 12 of the labor act was not within the legitimate objects of labor.

[7] Senate Report No. 105 on S. 1126, 80th Cong., 1st Sess., p. 51.

[8] House Conf. Rep. No. 510, on H.R. 3020, 80th Cong., 1st Sess. pp. 46, 59.

uniform contract provisions have always been regarded as protected concerted activities.

(5) *Restraint of Competition.* This subject, too, was considered by Congress in connection with enactment of the Taft-Hartley Act, as well as at other times. The House bill, in addition to prohibiting industry wide bargaining, also provided in Section 301(b) that the Clayton Act should be amended so as to exclude from the legitimate objects of labor organization any combination to restrict competition or impose restrictions or conditions upon the purchase, sale or use of any product, material, machine or equipment. H.R. 3020, Sec. 301(b). A similar provision was not included in the bill reported by the majority of the Senate Committee, but, again, the supplemental views of Senators Taft, Ball, Donnell and Jenner contain a recommendation for an amendment which would have opened the courts to anti-trust charges against unions of the same kind. This amendment, which was specifically described by its sponsor as being intended to "correct" the decision of this Court in the *Hutcheson* case[9] was defeated.[10]

The bill went to conference and, as with the restraint of industry-wide bargaining, the anti-trust provision was eliminated. As stated in the report of the House conferees:

> "Since the matters dealt with in this section have to a large measure been effectuated through the use of boycotts, and since the conference agreement contains effective provisions directly dealing with boycotts themselves, this provision is omitted from the conference agreement." (House Conf. Rep. No. 510 on H.R. 3020, 80th Cong., 1st Sess. p. 65.)

This Congressional rejection of the "anti-trust" approach to labor problems in favor of provisions "directly dealing"

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[9] 93 Cong. Rec. 4837, 4846 (1947).
[10] 93 Cong. Rec. 4847 (1947).

with specific abuses is especially significant. Historically, judicial action in the labor field typically masqueraded as a regulation of restraints of trade. See A. T. Mason, *Organized Labor and the Law* (1925) 22-50.[10a] The Wagner Act was a direct reaction to and rejection of the "anti-trust" approach to labor problems. "The most effective legal weapon against the struggling labor union was the doctrine that concerted activities were conspiracies, and for that reason illegal. Section 7 . . . took this conspiracy weapon away from the employer in employment relations which affect interstate commerce. No longer can any state, as to relations within reach of the Act, treat otherwise lawful activities to aid unionization as an illegal conspiracy merely because they are undertaken by many persons acting in concert." *Auto Workers* v. *Wis. Board*, 336 U.S. 245, 257-258; cf. *United States* v. *Hutcheson*, 312 U.S. 219.

When the pendulum began to swing the other way in 1947 and Congress sought to reverse the direction in which it had moved in the Wagner Act, it was natural that those who most strenuously pushed this reaction should propose to return again to the anti-trust concepts of conspiracy and combination. They did so propose. But the proposals were rejected. And they were rejected with full recognition of the historical development and interrelationship of anti-trust and labor relations concepts. Section 301 of the House bill, which would have reinjected anti-trust standards into the federal regulation of labor matters was opposed by the minority of the House Labor Committee solely on the basis that anti-trust laws are inappropriate for such purpose.

"The anti-trust laws are useful in promoting trade

[10a] ". . . it is common ground among students of the Sherman Law . . . that it has been one of the strongest influences counteracting trade unionism in the United States." Felix Frankfurter in Berman, *Labor and the Sherman Act* (1930 xiv.)

> and protecting consumers against the abuses of monopolistic business combinations. They are, however, ill-adapted as a means for maintaining stable labor-management relations or for policing union behavior." [11]

In the Senate the Ball amendment occasioned much oratory about the anti-trust decisions of this Court of an earlier era.[12]

The final action of the Senate in rejecting the Ball amendment and of Congress as a whole in rejecting Section 301 of the House bill shows the congressional recognition of the fact that all activities of unions have some effect on the market place and a congressional decision that the appropriate method of dealing with assumed abuses was to enact "effective provisions directly dealing" with the abuses themselves, not to return to the concepts of what is, or is not, a reasonable or justifiable interference with trade.

IV

MISSOURI HAS ACTED HERE WITHIN THE AREA OF CONGRESSIONAL REGULATION

The examination which we have made of the elements involved in Missouri's "anti-trust" decision here and of the matters considered by Congress in enacting the federal labor relations law make clear the conclusion that the state here has sought to deal with precisely the same problems which Congress dealt with in the federal Act. The social objectives involved in guaranteeing to employees freedom to join the union of their choice, in protecting employers from jurisdictional strikes and from pressures unrelated to their relationships with their own employees, in restricting the concerted activities of a union to one of many

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[11] House Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., p. 108.

[12] See, e.g., 93 Cong. Rec. 4197-4198, 4842-4843, 4872.

competing employers, in freeing trade and commerce from the interference resulting from union activity, were all considered and weighed by Congress in making the 1947 amendments to the Act.

The action of Congress in 1947 in specifying certain union unfair labor practices was not, of course, just a statement that certain concerted activities were federally forbidden. It was, in effect, a modification of the pre-existing rule, established by Congress in Section 7 of the Act in 1935, that employees should be free "to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Through the legislative resources available to it, Congress weighed these interdependent and interacting objectives and interests. It considered the impact of specific varieties of conduct upon the market place and it decided which should be prohibited and which should not. A state court, working within the confines of single cases in the judicial process, should not be permitted to plow the same ground which Congress has covered to its satisfaction. As this Court said in the *Garner* case:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing. For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits." *Garner* v. *Teamsters Union*, 346 U.S. 485, 499-500.

The conclusion of the *Garner* case that the collective action there involved, if not forbidden by the federal Act,

was within "the area of labor combat designed to be free" rests on one additional and unspoken premise—that the action sought to be restrained was of the kind included within the scope of the activities with which the federal Act is concerned. This was, perhaps, easy to see where the organization of employees was concerned. We think that it is equally true here.

We have already come to this conclusion by considering only the negative aspects of the union conduct which is here involved—the evils which Missouri saw in the petitioners' picketing. We found that they were the same as the evils which Congress considered when it established the federal labor policy in the Taft-Hartley Act. We have not examined the positive aspect—the legitimate interest of the employees and their union in achieving the kind of objective here involved. The Missouri court apparently saw no such positive social interest. This does not mean that it does not exist. It should, perhaps, be briefly sketched.

The nub of the controversy here was the Machinists' request to retain in their 1952 collective bargaining contract with the brewery a provision, first inserted in 1951, which limited the right of the brewery to contract out work of the kind "performed within the Employer's plant" by the employees represented by the Machinists' Union. The provision specified that if it became necessary to have such work "contracted out" the contract should be given to contractors who had contracts with the Machinists' Union covering such work. As found by the National Labor Relations Board when this same controversy was before it, the Machinists offered to limit this provision to the subcontracting of repair or replacement work, leaving the employer free to select any contractor for the installation of new machinery, even though the 1951 provision had contained no such limitation. The refusal of the employer to accept this proposal led to a strike by the Machinists and the picketing which Missouri enjoined.

The Missouri court assumed that the Machinists' only purpose was to displace the Millwrights' Union as the collective bargaining representative of certain employees of the construction contractors. The court considered such a purpose to be unlawful and alien to what it regarded as a proper "labor dispute". Perhaps the National Labor Relations Board would have agreed with this finding as to purpose if a charge based upon Sections 8(b)(2) or 8(b)(4)(A) or (B) had been heard and decided by it. Perhaps the Board would therefore have ordered the Machinists' Union to cease and desist. We do not think so. We suggest there are very good reasons to believe that the Board would not have so found and that, if the question had been presented to it, the Board would have found that the strike here was a concerted activity within the protection of Section 7 of the Act.

This controversy has been before the Board already on a charge that it involved a jurisdictional strike in violation of Section 8(b)(4)(D) of the federal Act. After full hearing and careful analysis, the board decided there was no violation of Section 8(b)(4)(D) for reasons which it summarized as follows:

> "The disagreement in this case relates only to the incorporation of the 1951 contractual provision, or a modified counterpart of it, in the 1952 contract then under negotiation—a provision intended to limit the Employer's *selection of contractors*. Such disagreement, viewed in the context of the contract negotiations, the desire on the part of the IAM to continue in effect the existing limitation on subcontracting, and all the surrounding factual circumstances, cannot, in our opinion, be equated with a *present* demand for the assignment of work such as is contemplated by Section 8(b)(4)(D) of the amended Act. Accordingly, we conclude that no dispute within the meaning of the Act was created either when the strike action was taken or when the incorporation of the provision in question was demanded.

> "As we have found on the record before us no 'dispute' within the meaning of Sections 8(b)(4)(D) and 10(k), we shall quash the notice of hearing issued in this proceeding." *International Association of Machinists*, 101 N.L.R.B. 346, 351-352 (1952) (italics in original).

One of the "surrounding factual circumstances" which the Board recited in its opinion was the fact that in 1951, when the contractual provision was first agreed to, as well as in 1952, when the employer sought to eliminate it, several contractors were in fact engaged in projects at the brewery. One of those contractors performed millwright work and his employees were covered by a collective bargaining agreement with the IAM. There was, apparently, no proof that it was or would become "necessary" to contract other work of this nature and the Board found, therefore, that there was no present demand for the assignment of work either with respect to the brewer's employees or with respect to any contractor's employees.

If we assume, then, that pressure was not being placed upon the brewery to compel an employer with which the brewery was doing business to take action against its employees, and if we assume no present dispute over work assignments, we are left substantially with the issue as to whether, under the federal Act, a Union has a right to bargain "for contractual limitations on an employer's power to subcontract work." 101 NLRB at 350.

The answer, we think, is obvious. Such clauses have appeared in many labor agreements, in this industry, and in others, and they perform a definite and desirable function, directly related to a union's interest in maintaining proper "wages, hours of employment, or other conditions of employment" [13] for the employees which it represents.

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[13] 29 U.S.C. (Supp V) § 159(a).

"Management considers contracting work out to be an exercise of its right to determine the means and method of production.

An employer who wishes to evade the basic provisions of his collective bargaining agreement need only contract work out of the bargaining unit. If he sends the work to be done by non-union help, or by men working under inferior union agreements, the Gresham's Law of labor relations will assert itself. The bad wages and conditions will drive out the good. The standards of the union agreement will be defeated by the indirect attacks of other employers if the primary employer is free to contract the work away from the unit.

For this reason employers and unions in many industries have inserted contracting-out clauses into their collective bargaining agreements. In the men's clothing industry in New York, for example, a standard contractual provision specified that "The Manufacturer who employs contractors shall employ only such contractors as employ only members of the union in good standing, and shall not cause or permit any work to be performed for him, directly or indirectly, by any person, partnership, corporation or contractor employing workers who are not members of the union in good standing." An arbitrator awarded damages and injunctive relief for a violation of this provision. *Irving Horowitz*, 8 Lab. Arb. 1001, 1004 (1947). The award was confirmed in the New York Supreme Court which held that "The collective bargaining agreement of the kind here involved has repeatedly been approved as not in violation of public policy or the Donnelly Act [New York anti-trust law]". *Potofsky* v.

Workers, on the other hand, sometimes regard subcontracting as a threat to their job opportunities, particularly if the work has customarily been done in the plant. They are also concerned over their working standards if the employer can send out work to plants with less favorable wage and working conditions. Unions, therefore, often seek to regulate or restrict the practice of subcontracting." U. S. Bureau of Labor Statistics Bulletin No. 908-12, *Collective Bargaining Provisions: Union and Management Functions, Rights and Responsibilities*, 20 (1949).

Horowitz, 8 Lab. Arb. 1063 (N.Y. Sup. Ct., 1947), *aff'd.* 90 N.Y. Supp. 2d 899 (App. Div. 1st Dept., 1949).

In the utility industry, an arbitration award required that the following clause be inserted in the collective labor agreement: "When building or construction work is to be contracted out by the company all other matters being relatively equal, the company will give preference to contractors having union agreements with the International Brotherhood of Electrical Workers, or affiliated unions, provided that nothing herein shall require the company to violate Federal, State or Municipal laws or regulations." The Board granted the award in the interest of healthful, stable and peaceful labor relations and because "such a clause is common practice in contracts with this union (16 of 18 submitted) . . ." *Duquesne Light Co. et al.*, 11 Lab. Arb. 1023, 1026—7, 1032 (1948).

One agreement of the IBEW, in the telephone industry, recognized the right of management to contract work out, but provided that "Such contractors, however, shall have agreements with International Brotherhood of Electrical Workers . . ." *Michigan Associated Telephone Co.*, 12 Lab. Arb. 190, 194 (1949).

Other examples include provisions in the agreement between the Merchants' Ladies' Garment Association, Inc., and the International Ladies Garment Workers Union, AFL [14] in the master agreement of Los Angeles furniture manufacturers [15] and in the oil industry.[16] A BLS study includes a number of others, without identifying the industry.[17]

The examples cited are of clauses of the particular kind here involved, requiring an employer to contract only with

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[14] Bureau of National Affairs, *Collective Bargaining Negotiation and Contracts*, 65:183.

[15] Super-Built Furniture Mfg. Co. 20 War Lab. Rep. 525, 526 (1944).

[16] Ashland Oil and Refining Co., 8 Lab. Arb. 465, 467 (1947).

[17] U. S. Bureau of Labor Statistics, *op. cit. supra* note 13, at 23-26.

firms employing members of the same union or unionized employees. There are of course many other types of contracting and sub-contracting provisions.

The employer may be forbidden to subcontract if the work can possibly be done by his own employees.[18] This may take the form of outlawing subcontracting if layoffs will be caused,[19] or the pay, working conditions and job security of the employees affected.[20] Employers have agreed not to subcontract unless the employees in the unit are "fully employed," [21] and have pledged to give preference to employees before subcontracting.[22] There may be restrictions on the nature of the work which may be contracted out,[23] or promises to let out only "surplus" work.[24] Prior consultation may be required.[25]

In some industries there are provisions that forbid subcontracting altogether. In the railroad industry, "it is well settled . . . that as an abstract principle a carrier may not let out to others the performance of work of a type embraced in one of its collective agreements with its em-

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[18] Yale & Towne Mfg. Co., 19 Lab. Arb. 882 (1953); Librascope, Inc., 19 Lab. Arb. 219 (1952); Pfeiffer Brewing Co., 16 Lab. Arb. 89 (1951); Munde Cork Corp., 16 Lab. Arb. 887 (1951). For other illustrations of the various subcontracting clauses, see U. S. Bureau of Labor Statistics, *op. cit. supra* note 13, at 20-30; Bureau of National Affairs, *op. cit. supra* note 14, at 65:181—65:186.

[19] Tin Processing Corp., 20 Lab. Arb. 227 (1953).

[20] Western Electric Co., Inc. 24 War Lab. Rep. 525, 535 (1945).

[21] Kaplan Furniture Co., 14 Lab. Arb. 10 (1950); cf. L. A. Young Spring & Wire Corp., 23 Lab. Arb. 400 (1954); East Texas Salt Water Disposal Co., 22 Lab. Arb. 484 (1953). In Fulton County Glove Industry, 4 War Lab. Rep. 307 (1942), the War Labor Board recommended a clause which required full operation before there could be any subcontracting.

[22] Allegheny Ludlam Steel Corp., 23 Lab. Arb. 171 (1954); Baldwin Locomotive Works, 11 Lab. Arb. 291 (1948).

[23] Sinclair Prairie Oil Co., 6 Lab. Arb. 855 (1947).

[24] Mullite Refractories, Inc., 13 Lab. Arb. 690 (1949).

[25] Corn Products Refining Co., 22 Lab. Arb. 68 (1953).

ployees." [26] And in the fur manufacturing industry in New York, a collective bargaining provision forbidding subcontracting was upheld by the state court, against the attack that it violated both the national and state anti-trust laws. The court declared that:

> "The 'no-contracting' provisions, now assailed as contrary to public policy and as illegal and unenforceable, have been incorporated in the collective labor agreements in this industry since 1928 and have been enforced. They pertain to matters in which the union and its membership have a direct economic interest and are essentially for the benefit of the union and its members and for the maintenance and preservation of concededly desirable standards and working conditions in the industry." *Matter of Mencher (Geller & Sons)*, 276 App. Div. 556, 562, 96 N.Y. Supp. 2d 13 (1950).[27]

The interest sought to be protected and the threat represented by indiscriminate subcontracting are so obvious that many arbitrators have ruled that an employer is not free to subcontract work away from the bargaining unit, even in the absence of a specific provision forbidding it.[28] They reason that the general spirit of collective bargaining, and the purpose of such clauses as union recognition and seniority, will be violated by affording the employer complete freedom to subcontract. And those arbitrators who hold the other way specify that they do so because of the

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[26] National Railroad Adjustment Board, Third Division, Award No. 757, p. 320, at p. 323 (1938).

[27] See Associated Fur Coat and Trimming Mfrs., Inc., 19 War Lab. Rep. 835, 836, 847 (1944).

[28] Lorraine Mfg. Co., 22 Lab. Arb. 390 (1954); Journal Publishing Co., 22 Lab. Arb. 108 (1954); A. D. Juilliard & Co., 21 Lab. Arb. 713 (1953); Magnolia Petroleum Co., 21 Lab. Arb. 267 (1953); National Tube Co., 17 Lab. Arb. 790 (1951); Stockholders Publishing Co., Inc., 16 Lab. Arb. 644 (151); Parke, Davis & Co., 15 Lab. Arb. 111 (1950); Celanese Corp. of America, 14 Lab. Arb. 31 (1950); American Cyanamide Co., 13 Lab. Arb. 652 (1949).

absence of a contractual provision that abridged the management right.[29]

We cannot, of course, list all the cases in which union agreements require that the employees of subcontractors be under agreement with the same union or observe union standards, or which otherwise regulate subcontracting. The samples we have given, however, are sufficient to demonstrate that the union activity here involved was of a kind and character clearly within the scope of the federal regulation. It may possibly fall within the prohibitions of one of the various subdivisions of Section 8(b). Consideration of all the relevant facts may, however, lead to the conclusion that it is not so prohibited. If so, it clearly falls within "the area of labor combat designed to be free." 346 U.S. at 500.

V

THE DECISION BELOW MUST BE REVERSED

To sum up the matter, we have here union action in support of a demand for a contract clause limiting the contracting-out of work. All such clauses, no matter what their precise content, necessarily have a limiting effect on the trade of contractors. They may exclude contractors from potential business entirely, limit the occasions on which they can compete, or limit the contractors who can compete. All of them can be said, in a sense, to be "restraints of trade".

Such clauses, on the other hand, can and do serve as appropriate and necessary adjuncts to labor's legitimate interest in achieving and maintaining certain standards of wages, hours and working conditions. We think it is clear

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[29] See, e.g., Carborundum Co., 20 Lab. Arb. 60 (1952); Appalachian Electric Cooperative, 19 Lab. Arb. 815 (1953); National Sugar Refining Co., 13 Lab. Arb. 991 (1949); International Harvester Co., 12 Lab. Arb. 707 (1949); U. S. Tool & Mfg. Co., 24 War Lab. Rep. 470 (1945); Graef & Schmidt Co., 24 War Lab. Rep. 297 (1945); Elkouri, *How Arbitration Works*, 237-239 (1952).

that Missouri could not seek to prevent any union from ever seeking a contracting-out clause. To do so would clearly interfere with the activities which Congress has protected.

The question then is whether Missouri can draw a line, whether it can outlaw those contracting-out clauses which it decides are contrary to its public policy. Our argument here is that whether it can do so or not depends upon the policy which Missouri is seeking to enforce. We have shown, we think, that the evils which Missouri saw here are precisely the evils with which Congress dealt in 1947. Congress, in short, has already drawn the line which Missouri seeks here to draw. It has drawn that line in terms of the specific unfair labor practices set forth in Section 8(b).

It is not necessary for this Court to decide on which side of the line the action of the Machinists here falls. That is a function which Congress has assigned to the National Labor Relations Board in the first instance and to the federal courts only as they are called upon to review the decisions of the Board. Missouri has no authority to make the initial decision, and this Court's function is to review only Missouri's right to decide. If Missouri had no right to make the decision its action here cannot stand.

CONCLUSION

For the reasons above stated the judgment of the Supreme Court of Missouri should be reversed and the complaint herein dismissed.

Respectfully submitted,

Congress of Industrial Organizations
ARTHUR J. GOLDBERG
General Counsel
DAVID E. FELLER
Associate General Counsel

1001 Connecticut Avenue, N. W.
Washington 6, D. C.